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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1035.

THOMAS TILLEY, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO AND THE COUNTY OF COOK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 18, 1880.

Wood

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INDEX.

	Original.	Print.
Bond for costs	2	1
Præcipe	2	1
Declaration	3	2
Writ of summons	10	5
Pleas of The County of Cook	11	5
Pleas of The City of Chicago	13	6
Replication to the plea of The County of Cook	14	7
Replication to the plea of The City of Chicago	15	7
Jury empaneled	17	8
Verdict	17	8
Motion for new trial	18	9
Judgment	19	9
Bill of exceptions	20	10
Bond	39	18
Clerk's certificate	41	19
Writ of error	42	19
Citation	43	20
Service	44	20

1 Pleas in the circuit court of the United States for the northern district of Illinois held at the United States court rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Monday, the fifth day of April, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fourth.

WILLIAM H. BRADLEY,
Clerk.

THOMAS TILLEY
v.
THE COUNTY OF COOK AND THE CITY OF CHICAGO. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *sct:*

Be it remembered that on the twenty-fourth day of August, A. D. 1878, came the said plaintiff, Thomas Tilley, by Melville W. Fuller, esq., and Messrs. Forrester and Beem, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois at Chicago in the district aforesaid his bond for costs and præcipe for a writ of summons and his declaration against said defendant in said entitled cause, which said bond, præcipe, and declaration are respectively in the words and figures following, to wit:

2 *Bond for costs.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, October term, A. D 1878.

THOMAS TILLEY
v.
THE COUNTY OF COOK AND THE CITY OF CHICAGO. } In assumpsit.

We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him we hereby agree and stipulate that execution may issue against our property for any costs taxed against us. Dated this twenty-fourth day of August, A. D. 1878.

ROBERT H. FORRESTER.

(Endorsed:) Filed Aug. 24, A. D. 1878. Wm. H. Bradley, c'erk.

Præcipe.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States for northern district of Illinois, October term, A. D. 1878.

THOMAS TILLEY
v.
THE COUNTY OF COOK AND THE CITY OF CHICAGO. } Assumpsit; damages, $200,000.00.

3 Issue summons in a plea of trespass on the case on promises

in which Thomas Tilley is plaintiff and The County of Cook and The City of Chicago are defendants, directed to the United States marshal of said district and returnable to the October term of said court, A. D. 1878.

Chicago, August 24th, 1878.

FORRESTER AND BEEM, AND
MELVILLE W. FULLER,
Attorneys for Plaintiff.

To WM. H. BRADLEY, Esq., *Clerk.*

(Endorsed:) Filed Aug. 24, '78. Wm. H. Bradley, cl'k.

Declaration.

Circuit court of the United States for the seventh circuit and northern district of Illinois, of the October term, A. D. 1878.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Thomas Tilley, who is a citizen and resident of the State of Indiana, plaintiff in this suit, by Forrester and Beem and Melville W. Fuller, his attorneys, complains of The County of Cook and The City of Chicago, which are municipal corporations, situated and being in the State of Illinois and said district, defendants in a plea of trespass on the case on promises.

4 For that whereas heretofore, to wit, on the tenth day of October, in the year of our Lord one thousand eight hundred and seventy-three, at Chicago, to wit, at said district, became and were indebted to the said plaintiff in a large sum of money, to wit, the sum of one hundred and forty-six thousand dollars of lawful money, for the work and labor, care and diligence, attention and attendance of the said plaintiff by the said plaintiff before that time done, performed, bestowed, and given in and about the goods, chattels, wares, machinery, property, premises, possessions, and business of the said defendants, and for the said defendants, and at the special instance and request of said defendants, and also for divers materials, and other necessary things by the said plaintiff before that time found, furnished, provided, used, and applied in and about that work and labor for the said defendants at the like special instance and request of said defendants, and being so indebted to the said plaintiff the said defendants, in consideration thereof, afterward, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay to said plaintiff said sum of money last mentioned when the said defendants should be thereunto afterwards requested.

5 And whereas also afterward, to wit, on the same day and year and at the place aforesaid, in consideration that the said plaintiff had before that time done, performed, bestowed, and given other work and labor, care and diligence, attention and attendance of the said plaintiff in and about the goods, chattels, wares, machinery, property, premises, possessions, and business of the said defendants, at the request of said defendants, and had also, at the like special instance and request of said defendants, before that time found, furnished, provided, used, and applied divers other materials and necessary things in and about the said last-mentioned work and labor of the said plaintiff, the said defendants undertook, and then and there faithfully promised the

said plaintiff well and truly to pay to the said plaintiff so much money as the last aforesaid work and labor and materials of said plaintiff at the time aforesaid were reasonably worth when said defendants should be thereunto afterward requested; and the said plaintiff avers that the same at said time were reasonably worth the further large sum of one hundred and forty-six thousand dollars of like lawful money at the time and place aforesaid, whereof the said defendants afterward, to wit, at the time and place aforesaid, had notice.

And whereas also the said defendants afterward, to wit, on the same day and year and at the place aforesaid, became and were indebted to the said plaintiff in a large sum of money, to wit, the sum of one
6 hundred and forty-six thousand dollars of lawful money for divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the said defendants, and at the special instance and request of the said defendants, and being so indebted to the said plaintiff, the said defendants in consideration thereof afterward, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay to the said plaintiff the said sum of money last mentioned, when the said defendants should be thereunto afterward requested.

And whereas also afterward, to wit, on the same day and year and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendants, sold and delivered to the said defendants divers other goods, wares, and merchandise of the said plaintiff, the said defendants then and there undertook and faithfully promised the said plaintiff that the said defendants would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandise at the time of the sale and delivery thereof were reasonably worth when the said defendants should be thereunto afterward requested; and the said plaintiff avers that the said goods, wares, and merchandise last mentioned at the
7 time of the sale and delivery thereof were reasonably worth the further large sum of money, to wit, the sum of one hundred and forty-six thousand dollars of like lawful money aforesaid, to wit, at the place aforesaid, whereof the said defendants afterward on the same day and year and at the place aforesaid had notice.

And whereas also the said defendants afterward, to wit, on the same day and year and at the place aforesaid, became and were indebted to the said plaintiff in the further large sum of money, to wit, the sum of one hundred and forty-six thousand dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the defendants, and at the like request of the said defendants, and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendants and at the like request of the said defendants, and for other money by the said defendants before that time had and received to and for the use of the said plaintiff and for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendants to said plaintiff, and being so indebted the said defendants in consideration thereof afterward, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the
8 said plaintiff well and truly to pay unto the said plaintiff the said several sums of money in this count mentioned when the said defendants should be thereunto afterward requested.

And whereas also, the said defendants afterward, to wit, on the same

day and year and at the place, aforesaid, accounted with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendants then and there were found to be in arrear and indebted to the said plaintiff in the further large sum of money, to wit, the sum of one hundred and forty six thousand dollars of like lawful money as aforesaid, and being so found in arrear and indebted to the said plaintiff, the said defendants in consideration thereof, afterward, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendants should be thereunto afterwards requested.

Nevertheless the said defendants (although often requested, etc.) have not yet paid the several said sums of money above mentioned or any or either of them, or any part thereof to the said plaintiff,
9 but to pay the same or any part thereof to the said plaintiff the said defendants have hitherto altogether refused and still do refuse to the damage of the said plaintiff of two hundred thousand dollars, and therefore the said plaint iff brings suit, etc.

FORRESTER AND BEEM AND
MELVILLE W. FULLER,
Plaintiff's Attorneys.

Copy of instrument and account sued on.

The County of Cook and the City of Chicago to Thomas Tilley, Dr.

For services as architect in preparing plans, drawings, specifications, diagrams, estimates, and details for the new court-house and city hall, and superintendence of erecting the same, 5 per cent. on $2,909,629, the estimated cost of the building, the plan being that known as "Eureka".....	$145,481 45

The County of Cook and the City of Chicago to Thomas Tilley, Dr.

To money lent and advanced.....	$146,000
To money paid, laid out, and expended.....	$146,000
To money had and received to and for the use of said plaintiff.....	$146,000
To goods, wares, and merchandise sold and delivered...	$146,000
To labor and services	$146,000
To balance due on account stated	$146,000

10 (Endorsed:) Filed this 24th day of August, 1878. Wm. H. Bradley, clerk.

And on the same day, to wit, the 24th day of August, A. D. 1878, a writ of summons issued out of said clerk's office in said entitled cause, which said writ, with the return of the marshal thereon endorsed, is in the words and figures following, to wit:

Writ of summons.

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon the county of Cook and the city of Chicago, in the State of Illinois, in said district, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Thomas Tilley, of a plea of trespass on the case upon promises to his damage, as he alleges, of two hundred thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this
11 24th day of August, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 103d year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

I have served the within writ personally upon the within named city of Chicago, by delivering to Monroe Heath, mayor of said city, a true copy thereof, this 27th day of September, A. D. 1878. I also served the same upon the county of Cook within named, by personally delivering a true copy thereof to Henry C. Scune, president of the board of Cook County commissioners, this 27 day of September, A. D. 1878.

J. S. HILDRUP,
U. S. Marshal.
D. D. SABIN,
Deputy.

(Endorsed:) Filed Sep. 30, 1878. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 9th day of October, A. D. 1878, said county of Cook, by its attorney, filed in said clerk's office its pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

Pleas of the County of Cook.

Circuit court of the United States, northern district of Illinois. October term, 1878.

12 THOMAS TILLEY
v.
THE CITY OF CHICAGO AND THE COUNTY OF Cook. } Assumpsit.

And now comes the defendant, the County of Cook, by Martin R. M. Wallace, its attorney, and defends the wrong and injury when, &c., and says that it did not undertake or promise in manner and form as the plaintiff has above thereof complained against it, and of this it puts itself upon the country, &c.

And for a further plea in this behalf this defendant, The County of Cook, says actio non, because, it says, that after the making of the

said promises in the said declaration mentioned and before the commencement of this suit, to wit, on, etc., in, etc., it paid to the plaintiff and the plaintiff accepted from it, the defendant, divers moneys amounting to a large sum, to wit, the amount of all the sums of money in the said declaration mentioned, in full satisfaction and discharge of the said several promises and of the sums of money last aforesaid, and this defendant is ready to verify; wherefore it prays judgment, &c.

MARTIN R. M. WALLACE,
Att'y for Def't, County of Cook.

(Endorsed:) Filed Oct. 9, 1878. Wm. H. Bradley, clerk.

13 And on the same day, to wit, the 9th day of October, A. D. 1878, said defendant, the City of Chicago, by its solicitor, filed in said clerk's office its pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

Pleas of the city of Chicago.

Circuit court of the United States, northern district of Illinois. October term, 1878.

THOMAS TILLEY
v.
THE CITY OF CHICAGO AND THE COUNTY OF Cook. } Assumpsit.

And now comes the said defendant, The City of Chicago, by Richard S. Tuthill, its attorney, and defends the wrong and injury, when, &c., and says that it did not undertake or promise, in manner and form as the plaintiff has above thereof complained against it, and of this defendant puts itself upon the country, &c.

And for a further plea in this behalf defendant, The City of Chicago, says actio non, because, it says, that after the making of the several promises in the said declaration mentioned, and befor the commencement of this suit, to wit, on, etc., in, etc., it paid to the plaintiff, and the plaintiff accepted from it, this defendant, divers moneys, amounting to a large sum, to wit, the amount of all the sums of money in the said declaration mentioned, in full satisfaction and discharge of the said several promises, and of the sums of money last aforesaid, and this defendant is ready to verify; wherefore it prays judgment, &c.

14 RICHARD S. TUTHILL,
Att'y for Def't, City of Chicago.

(Endorsed:) Filed Oct. 9, 1878. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 25th day of October, A. D. 1878, said plaintiff, by its attorneys, filed in said clerk's office its replication to the plea of the county of Cook in said entitled cause, which said replication is in the words and figures following, to wit:

Replication to the plea of the county of Cook.

Circuit court of the United States for the northern district of Illinois, of the October term, A. D. 1878, ss:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

THOMAS TILLEY
vs.
THE CITY OF CHICAGO AND THE COUNTY OF Cook. } Assumpsit.

And the plaintiff, as to the plea of the County of Cook, one of the defendants, by it first above pleaded, and whereof it has put itself upon the country, does the like.

And the plaintiff, as to the plea by the said defendant by it secondly above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action, because he says that the defendant did not pay to the plaintiff the
15 moneys in the said second plea in that behalf mentioned in full satisfaction and discharge of the several promises and sums of money in the said declaration mentioned, in manner and form as the defendant has above in that plea alleged, and this the plaintiff prays may be inquired of by the country, &c.

FORRESTER AND BEEM AND
MELVILLE W. FULLER,
Att'ys for Pl'ff.

And the defendant, the County of Cook, doth the like.
6 March, 1879.

CONSIDER H. WILLETT,
Att'y for County of Cook.

(Endorsed:) Filed Oct. 25, 1878. Wm. H. Bradley, cl'k.

And on the same day, to wit, the 25th day of October, A. D. 1878, said plaintiff, by his attorneys, filed in said clerk's office his replication to the plea of the said defendant, the City of Chicago, in said entitled cause, which said replication is in the words and figures following, to wit:

Replication.

Circuit court of the United States for the northern district of Illinois, of the October term, A. D. 1878, ss:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

THOMAS TILLEY
vs.
16 THE CITY OF CHICAGO AND THE COUNty of Cook. } Assumpsit.

And the plaintiff as to the plea of the city of Chicago, one of the de-

fendants, by it first above pleaded, and whereof it has put itself upon the country, does the like.

And the plaintiff as to the plea by it secondly above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged ought not to be barred from having his aforesaid action, because he says that the defendant did not pay to the plaintiff the moneys in the said second plea in that behalf mentioned in full satisfaction and discharge of the several promises and sums of money in the said declaration mentioned in manner and form as the defendant has above in that plea alleged, and this the plaintiff prays may be enquired of by the country, &c.

FORRESTER AND BEEM AND
MELVILLE W. FULLER,
Att'ys for Pl'ff.

(Endorsed:) Filed Oct. 25, '78. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 21st day of January, A. D. 1880, in the December term, A. D. 1879, of said court, in the record of the proceedings thereof in said entitled cause, before the honorable Henry
17 W. Blodgett, district judge, is the following entry, to wit:

THOMAS TILLEY
v.
THE COUNTY OF COOK AND THE CITY OF Chicago. } Assumpsit.

Now come the parties by their attorneys, and come also the following jury, to wit, C. A. Worden, William Halley, William Knapp, C. W. Day, John H. Palmer, S. R. Morse, Stephen Lasher, William H. Phelps, Warren Turner, Warren Rogers, N. J. Adams, and J. C. Persels, in all twelve good and lawful jurors, duly elected, tried, and sworn to well and truly try said issue and a true verdict give according to the law and evidence, and thereupon the hour for adjournment having arrived, the further trial of this cause is postponed until to-morrow morning.

Afterwards, to wit, on the 22d day of January, A. D. 1880, in the December term, A. D. 1879, of said court, in the record of the proceedings hereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THOMAS TILLEY
v.
THE CITY OF CHICAGO AND THE COUNTY OF Cook. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury on this behalf empaneled and sworn, and by agreement of the parties by their attorneys, it is ordered by the court that C. W.
18 Day, one of the jurors, empaneled herein, be excused from the further trial of the cause, and thereupon, by agreement, Wesley Nowlin was duly elected, tried, and sworn well and truly to try the issue herein in place of said C. W. Day; and after hearing the concluding evidence and receiving the instructions of the court, the jury returned the following verdict, to wit: We, the jury, find the issue for the defendants. And thereupon the plaintiff, by his attorney, moves the court for a new trial herein.

Afterwards, to wit, on the 11th day of February, A. D. 1880, said plaintiff, by his attorney, filed in said clerk's office his motion for a new trial in said entitled cause, which said motion is in the words and figures following, to wit:

Motion for new trial.

In the circuit court of the United States, northern district of Illinois.

THOMAS TILLEY
v.
THE CITY OF CHICAGO AND THE COUNTY OF Cook.

And now comes the plaintiff, by his attorney aforesaid, and moves the court to set aside the verdict rendered and to grant a new trial of this cause.

And for grounds of his motion the plaintiff shows to the court the following, to wit:

First. The court improperly instructed the jury to find for the defendants.

Second. The court improperly refused to admit proper evidence offered by the plaintiff; that is to say, evidence of the value of the plaintiff's services; of the custom of architects that the adoption of one
19 out of several competitive plans was a contract on the part of the party adopting them to pay for the same; and of evidence of the services and work and labor performed by the plaintiff.

Third. That the court improperly stated in the presence and hearing of the jury that the premium was the price in full for the plaintiff's plans, and that the payment of the premium was payment in full for the same; and that the joint resolution of the city and county adopting said plans was not a contract with the plaintiff, but was merely an expression of preference on their part.

Fourth. The verdict was contrary to the law and the evidence in the case.

FORRESTER AND BEEM AND
MELVILLE W. FULLER,
Att'ys for Plaintiff.

(Endorsed:) Filed Feb'y 11, 1880. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 5th day of April, A. D. 1880, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THOMAS TILLEY
v.
THE COUNTY OF COOK AND THE CITY OF Chicago. } Assumpsit.
20

Now come the parties, by their attorneys, and now comes on to be heard the motion of the plaintiff, heretofore entered herein, for a new trial of this cause; and after hearing the argument of the plaintiff's counsel, the court being sufficiently advised in the premises, overrules said motion and awards judgment.

It is thereupon considered and adjudged by the court that the defend-

ants do have and recover of the plaintiff their costs and charges in this behalf expended, amounting to ten dollars and twenty cents, and that they have execution therefor.

And on the same day, to wit, the 5th day of April, A. D. 1880, on the hearing of said cause, the following exceptions were taken and allowed by the court and made of record in said entitled cause, in the words and figures following, to wit:

Bill of exceptions.

In the United States circuit court in and for the northern district of Illinois.

THOMAS TILLEY
v.
THE COUNTY OF COOK AND THE CITY OF Chicago. } Bill of exceptions.

Be it remembered that this cause came on to be tried before the Hon. Henry W. Blodgett, sitting as judge of said circuit court, and a jury, and thereupon the plaintiff, to maintain and prove the issues on his part, read in evidence the following resolutions adopted by the board of commissioners of Cook County, July 10, 1872:

21 "Resolved, That it is the sense of the joint meeting that they recommend to the common council of the city of Chicago and the board of commissioners of Cook County that the city of Chicago and the County of Cook will authorize the building committees of the several boards to offer a prize of five thousand dollars ($5,000) for the best plan, two thousand dollars ($2,000) for the second, and one thousand dollars ($1,000) for the third best plan for a court-house and city hall, to be erected jointly by the county of Cook and city of Chicago upon the public square in the city of Chicago, the said plans to be submitted to respective boards, in conjunction with the board of public works of the city of Chicago.

"Resolved, That the corporation counsel and county attorney are directed, under the general instructions of the committees on public buildings of the county and city, to draw a contract for the use of the west half of the court-house square and the building to be erected thereon. Said contract to be submitted to the common council and board of commissioners for consideration, amendment, or ratification.

"The basis of said contract to be the existing rights and agreements of the respective municipal corporation in said court house square, the same to be modified to meet the future necessities of the situation, and that such contract or lease contain a clause or condition that said premises are to be used for city halls and such other offices and purposes as are incidental thereto, and that whenever the city ceases to use
22 said premises for such purposes that the same reverts to the county.

"Resolved, That on or before the first day of August, the building committee of the county commissioners of Cook County, with the board of public works of the city of Chicago, prepare in detail, as nearly as possible, the number and size of the various rooms, court rooms, and offices that may be wanted in the building to be erected, with the uses which is to be made of them. Such details to be handed over to the various architects that may desire to present plans in ac-

cordance with an advertisement hereafter to be made by the county of Cook and city of Chicago, as soon as the details can be finally agreed upon."

And the following resolutions, adopted by the common council of the city of Chicago, at a meeting thereof, held July 15th, 1872, being resolutions heretofore reported by a joint committee, to wit:

"Resolved, That it is the sense of this joint meeting that they will recommend to the common council of the city of Chicago and the board of commissioners of Cook County, that the city of Chicago and county of Cook will authorize the building committees of the several boards to offer a prize of five thousand dollars ($5,000) for the best plan, two thousand dollars ($2,000) for the second, and one thousand dollars ($1,000) for the third best plan for a court-house and city hall, to be erected jointly by the county of Cook and city of Chicago upon the public square in the city of Chicago; the said plans to be sub-
23 mitted to the respective boards in conjunction with the board of public works of the city of Chicago.

"Resolved, That on or before the first day of August, the building committee of the county commissioners of Cook County with the board of public works of the city of Chicago prepare in detail as nearly as possible the number and size of the various rooms, court rooms, and offices that may be wanted in the building to be erected, with the uses which is to be made them; such details to be handed over to the various architects that may desire to present plans in accordance with an advertisement hereafter to be made by the county of Cook and city of Chicago, as soon as the details can be finally agreed upon.

"Resolved, That the corporation counsel and county attorney are directed, under the general instructions of the respective committees on public buildings of the county and city, to draw a contract for the use of the west half of the court-house square and the building to be erected thereon; said contract to be submitted to the common council and board of commissioners for consideration, amendment, or ratification. The basis of said contract to be the existing rights and agreements of the respective municipal corporations in said court-house square, the same to be modified to meet the future necessities of the situation."

Also an order of the common council for a joint contract between the city of Chicago and county of Cook and a similar order of the county board, both passed August 5th, 1872, and the contract executed
24 by the city and the county, as follows:

Contract of the City of Chicago and County of Cook.

This agreement, made and entered into this twenty-eighth day of August, A. D. eighteen hundred and seventy-two, by and between the board of county commissioners of Cook County, representing said county, party of the first part, and the city of Chicago, party of the second part, witnesseth:

That whereas the said board of commissioners did heretofore, to wit, on the fifth day of August, A. D. eighteen hundred and seventy-two, adopt a preamble and resolutions, to wit:

"Whereas the county of Cook is the owner of block 39, in the original town of Chicago, commonly known as Court-house Square, bounded by Randolph street on the north, by Clark street on east, by Washington street on the south, and by La Salle street on the west, subject to certain rights of the city of Chicago in the west half of said block, and it is desired that all former arrrangements between said city and

said county, in reference to the same, shall be merged into a new agreement; and—

"Whereas the city of Chicago proposes to erect a city hall for the public offices of said city and the administration of its government at some central point in said city where the public may be accommodated; and

"Whereas the board of commissioners of Cook County propose to erect on said block a court-house for the courts of Cook County and the public offices connected with the administration of the affairs of
25 the county; and

"Whereas it is for the convenience of the public and of all persons who desire to transact business with public officers, that the courts, and all officers connected with the administration of the affairs of the county of Cook and the city of Chicago, should be located at some one convenient point and readily accessible to each other: therefore,

"Resolved, that an agreement be entered into by and on the part of the board of commissioners of Cook County, representing said county, of the one part, and the city of Chicago of the other part, whereby—

"'1. The said parties shall join in the erection of a public building in said block 39, for the use of the county and city governments, respectively, and the courts of record of said county.

"'2. The general exterior design of said building shall be of uniform character and apearanceas may hereafter be agreed upon by the board of county commissioners and the common council of the city of Chicago.

"'3. That portion of the said building situate west of the north and south center line of said block shall be erected by the city of Chicago at its own expense.

"'4. The city of Chicago shall occupy that portion of said block west of the said center line for a city hall and offices incidental to the administration of the city government, and for no other purpose whatever, except, as hereinafter provided.

'"5. Each of the parties hereto will heat, light, and otherwise
26 maintain, and furnish its own portion of said building.

"'6. The necessary expense of improving the grounds around said building and maintaining the same shall be paid equally by the city and county.

"'7. The said agreement shall contain a covenant on the part of the county that the said city of Chicago shall have the control and occupancy of the said west half of said block for the said city hall and the public city offices incidental to the government of said city, without hindrance, henceforth and forever: Provided that whenever the city of Chicago shall cease to use the same for the purposes aforesaid, or shall rent the same, or any portion hereof, for any other purposes than herein specified, then the said county shall have the right to resume the possession thereof, and in such case the said city shall forfeit all its rights therein, and this contract shall be null and void, but no forfeiture shall be incurred by the use of the same for supreme court purposes, if the city should desire to so use the same.

"'8. The president of the board of Cook County commissioners, together with the building committee and the county clerk, attested by the seal of the county court of Cook County, shall be, and they are hereby, authorized and empowered to execute such agreement, for and in behalf of the board of county commissioners of Cook County, and the same, when executed by and on behalf of the city of Chicago, by its
27 proper officers, shall be binding on the parties respectively, to the extent and for the purposes hereinbefore set forth.'

"And whereas heretofore, to wit, on the fifth (5th) day of August, A. D. eighteen hundred and seventy-two, the common council of the city of Chicago also adopted the said preamble and resolutions, modifying the same only to the extent that the agreement therein referred to should be executed on the part of the city of Chicago by the mayor and comptroller and the city clerk, and attested under the corporation seal of said city:

"Now, therefore, in consideration of the premises, and the benefits that will result to the parties respectively, and the convenience the public will derive by reason of locating in one bulding the courts of record of Cook County, and all public offices connected with the administration of the affairs of the county of Cook and city of Chicago, it is hereby agreed as follows, to wit:

"1. That the parties hereto will join in the erection of a public building on block thirty-nine in the original town of Chicago, for the use of the county and city governments, and the courts of record in said county.

"2. The general exterior design of said building shall be of a uniform character and appearance, as may hereafter be agreed upon the board of county commissioners and the common council of the city of Chicago.

"3. That portion of said building situate west of the north and south center line of said block, shall be erected by the city of Chicago at its own expense.

28 "4 That the city of Chicago shall occupy that portion of said block west of said centre line for a city hall and offices incidental to the administration of the city government and for no other purpose whatsoever, except as hereinafter provided.

"5. That each of the parties hereto will heat, light, and otherwise maintain and furnish its own portion of said building.

"6. That the necessary expense of improving the grounds around said building and maintaining the same, shall be paid equally by said county and city.

"And it is hereby covenanted and agreed, by and on the part of the said party of the first part, that the said city of Chicago shall have the control and occupancy of the said west half of said block for the said city hall and public city offices incidental to the government of said city, without hindrance, henceforth and forever:

"Provided, that whenever the city of Chicago shall cease to use the same for the purposes aforesaid, or shall rent the same, or any portion thereof, for any other purposes than herein specified, then the said county shall have the right to resume possession thereof, and in such case the said city shall forfeit all its rights therein, and this contract shall be null and void; but no forfeiture shall be incurred by the use of the same for supreme court purposes, if the city should desire to so use the same.

"In witness whereof the parties hereto have caused these pres-

29 ents to be executed for and on the part of the party of the first part, by the president of the board of Cook County commissioners, the committee on public buildings of said board, and the county clerk, and attested by the seal of the county court of Cook County, and for and on the part of the said party of the second part, by the mayor

and comptroller, with the city clerk, and attested by the corporation seal of the city of Chicago, the day and year first above written.

[SEAL OF COUNTY COURT.] "JULIUS WHITE,
"*President Board of Cook County Commissioners.*
"S. ASHTON,
"CHRISTIAN WAHL,
"JOHN CRAWFORD,
"J. H. PAHLMAN,
"*Committee on Public Buildings.*

"G. W. WHEELER,
"*County Clerk pro tem.*

[SEAL OF CITY.] "JOSEPH MEDILL,
"*Mayor of the City of Chicago.*
"A. H. BURLEY,
Comptroller.

"C. T. HOTCHKISS,
"*City Clerk.*"

The plaintiff then introduced in evidence the advertisements for plans in competition signed by the building committees of the common council, and of the county board, and by the board of public works of the city of Chicago, and first published November 25th, 1872, as follows:

Designs for court-house.

To architects:

30 Designs for the construction of a public building on the square bounded by Randolph, Clark, Washington, and La Salle streets in the city of Chicago, to be used jointly by the county and city for a court-house and city hall, will be received at the office of the board of public works in said city until March 15th, A. D. 1880.

In order to secure suitable designs, the county of Cook and the city of Chicago offer, jointly, the following premiums:

For the best plan	$5,000
" " 2d "	2,000
" " 3d "	1,000

The building committees of the county commissioners of Cook County and of the common council of the city of Chicago and of the board of public works are to be the judges of the merits of the plans submitted.

A general description of the building, and a schedule of the number and sizes of the various rooms required have been prepared, and may be had on application to the board of public works of said city.

Designs must be sealed and endorsed "Designs for court-house and city hall, Chicago, and addressed to the building committees of the county of Cook and city of Chicago."

Also the general instructions to the competing architects referred to in the advertisement, as follows:

General instructions to competing architects:

31 The county of Cook and the city of Chicago, being about to erect a court-house and city hall in said city, in which all the

accommodation required for the business of every department of said county and city is to be provided, have determined to invite architects generally to send in designs in competition. The designs must include the principal elevations, which must be prepared in either Indian ink or sepia, without the introduction of any other color, and also complete plans and sections of each floor.

All drawings must be made to a scale of eight (8) feet to an inch on sheets of plain paper and mounted, without frames or borders.

The plans of the building must show the relative position of the offices assigned to the several departments, and the size of each room must be clearly marked thereon in feet and inches.

Entrances will be on the four sides of the building.

The main or principal floor will be elevated so as to admit of a thoroughly-lighted basement underneath.

Each design must have a device or motto marked on each drawing, and be accompanied by a sealed letter, giving the name of the author, which will be opened after the final award is made, only for the purpose of ascertaining the names of the successful architects, and for
32 the return of the unsuccessful drawings to their authors. As it is the wish of the county and city to secure in this important work the largest possible competition, they offer jointly the following premiums:

For the best design	$5,000 00
" second best design	2,000 00
" third " "	1,000 00

The building committees and board of public works will reserve the right to exhibit the whole of the designs for one month either before or after the award is made, as they see fit.

Each competitor will give the cubical contents of his building and an estimate of the cost of the same, complete.

The whole building must be made, as far as practicable, fire proof.

Sealed drawings will be received at the office of the board of public works corner of Adams and La Salle streets until the 15th day of March, A. D. 1873, at which time and place they will be opened by the building committees of the county commissioners and common council and the board of public works.

A plan showing the size of the square upon which the building is to be erected, together with a statement as to the nature and approximate extent of the accom'odation required, will be found in the appendix hereto annexed.

To which was attached an appendix giving plan of square and approximate accom'dations to be provided.

A report awarding the prizes, as follows: First prize, of $5,000,
33 to O. H. Matz, "Justitia." Second, of $2,000, to H. L. Gay, "Aut Cæsar aut nullus." Third, of $1,000, to Thomas Tilley, "Eureka," was made to the common council and to the county board; and August 4th, 1873, the county board adopted the following resolution to wit:

"Resolved, That the report of the various committees awarding the prizes for the plans of a court-house now before this board be adopted, and the prizes awarded according to their recommendations, but nothing in this resolution shall be construed so as to express a preference for any plan to build the court-house by."

And on August 18th, 1873, the common council adopted the following:

"That the report of the majority of the joint committee awarding the prizes for plans of court-house and city hall shall be concurred in and the award confirmed, provided that nothing herein or in said report contained shall be construed as indicating a preference for either of said plans as to which shall be finally adopted, from which the said building shall be erected."

It was admitted that the plaintiff was paid the third prize of one thousand dollars.

Plaintiff then offered in evidence the following resolution, adopted by the common council October 10th, 1873:

"Resolved, That the plan known as Eureka, or number 5 (five) in the collection, submitted for court-house and city hall, be, and is hereby, selected and adopted as the plan after which to build such court-house and city hall (the board of commissioners of Cook County concurring), subject to such change and modifications as may hereafter be determined upon by the common council of the city of Chicago and the county board, provided the estimate of the architect who presented said plan as to the cost of construction of the building shall be verified."

And also the following resolution, adopted by the board of commissioners of Cook County August 25th, 1873, to wit:

"Resolved, That the plan known as Eureka, or number five in the collection submitted for court-house and city hall, be, and is hereby, selected and adopted as the plan after which to build such court-house and city hall, the common council of the city of Chicago concurring, subject to such changes and modifications as may hereafter be determined upon by the common council of the city of Chicago and this board, provided the estimate of the architect who has presented the said plan as to the cost of the construction of the building shall be verified."

The plaintiff was then sworn as a witness, and testified that he was an architect of fifteen years standing; that he prepared the plans known from the motto he used as the "Eureka" plans; that after the passage of the resolution of October 10th, 1873, by the common council, and August 25th, 1873, by the county board. Witness verified the cost of the construction of the building in the way customary and usual with architects, which was made up at the rate of thirty-five cents a cubic foot for the building, and was indorsed by some fourteen or fifteen architects. This is the way that the cost of different public buildings throughout the United States is estimated and is a proper basis for such estimate.

This verification witness furnished to the county board and to the common council within two weeks after October 10th, 1873, and as soon as it could be reasonably prepared. It included bills as well as the indorsement of the architects.

The verification is in substance as follows:

	Area called for.	Area given per plan.	Margin.
Basement	19,680	43,738	24,058
First story	44,731	48,566	3,835
Second story	27,554	40,929	13,375
Third story	36,175	43,470	7,305
Totals	128,140	176,703	48,563

"These areas do not include the rotunda, galleries, &c., cupola, corridors, or sub-basement. In the basement and first story the superficial area of large vaults is doubled, as they are carried out internally as two-story vaults, the single area of which equals 7.240 square feet. Total margin of vaults named above only counted as one story is 41,320 square feet.

"Cubical contents 7,250,320 cubic feet, estimated at 35 cents per cubic foot $2,537,612

"Dome, estimated at 35 cents per cubic foot 358,400

"Total estimated cost of building $2,896,012

Estimate of cost.

	Per T. Tilley.	Per actual bid.
Mason work	$763,741	$650,000
Cut stone	948,972	912,000
Iron work	673,565	661,000
Carpenter work	268,784	247,500
Plumbing and gas-fitting	57,304	39,425
Heating and elevators	87,956	85,250
Plate glass, $71,240; frescoing and painting, $37,800	109,040	115,000
Tiling, no bid	43,794	43,794
Marble work	15,470	15,470
Statuary and decorations	33,153	33,153
Prismatic lights	3,750	3,750
Lightning-rods	4,100	4,100
Per T. Tilley, p'r bid	2,909,629	2,810,424

"The above bids are from good, responsible contractors, who will furnish sufficient security to complete their parts of the work at the sums specified above. There is also one bid from a firm of builders to complete the whole building for the sum of $2,985,000:"

Mr. Tilley, in his verification, further states as follows:

"The cubical contents of my building are 8,274,320 cubic feet including dome, which estimated at a maximum price of 35 cents per cubic foot = $2,896,012 $\frac{00}{100}$."

Then follows an endorsement of Mr. Tilley's estimate signed by fifteen architects, and after that the actual bids, the amounts of which have been heretofore given.

37 The witness produced all the "Eureka" plans, being complete plans for the building, and plaintiff offered evidence to prove the value of said plans, to which defendants objected and the court sustained the objection and refused to allow the plaintiff to introduce evidence of the value of the plans to which; ruling of the court the plaintiff then and there excepted.

The plaintiff also offered evidence to prove the time taken and the expenses incurred in the preparation of the plans, to which the defendants objected and the court sustained the objection and refused to allow the plaintiff to introduce such evidence; to which decision and ruling of the court the plaintiff then and there duly excepted.

The plaintiff also offered evidence to establish that by the usage and custom of architects in the absence of a special contract, the super-

intendence of the construction of a building belongs to the architect whose plans are adopted.

To the introduction of this evidence the defendants objected, and the court sustained the objection, and refused to admit the evidence to which rulings and decision the plaintiff then and there excepted.

The plaintiff also offered evidence to prove that by the usage and custom of architects, where prizes for plans were offered, the plans of the successful competitors belonged to them, and, if subsequently adopted as the plans to build by, were always paid for in addition to the
38 price itself. To this defendants objected, and the court sustained the objection and would not permit the evidence to be introduced; to which rulings and decision of the court the plaintiff then and there duly excepted.

The plaintiff also offered evidence to establish the value of the services rendered in verifying the cost of the proposed building according to the "Eureka" plans, to which the defendants objected, and the court sustained the objection and refused to allow the evidence to be introduced; to which rulings and decision of the court the plaintiff then and there duly excepted.

Which was all the evidence given or offered to be given in the cause.

The plaintiff then rested his case; whereupon the court directed the jury to find for the defendants.

To which the plaintiff then and there excepted.

The jury having returned a verdict for defendants as directed by the court, the plaintiff moved for a new trial, which motion was overruled by the court, and judgment entered upon the verdict.

To which rulings and decisions of the court the plaintiff then and there duly excepted.

And forasmuch as the matters and things hereinbefore set forth do not otherwise appear, the plaintiff prays that this his bill of exceptions may be signed and sealed by the court, and made part of the record herein, which is done accordingly.

39 [SEAL.] H. W. BLODGETT, *Judge.*

(Endorsed:) Filed April 5, 1880. Wm. H. Bradley, cl'k.

And afterwards, to wit, on the 20th day of September, A. D. 1880, said plaintiff, by his attorney, filed in said clerk's office his bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

THOMAS TILLEY
v.
THE CITY OF CHICAGO AND THE COUNTY OF COOK.

Know all men by these presents that we, Thomas Tilley, as principal, and Howard, surety, are held and firmly bound unto The City of Chicago and The County of Cook in the penal sum of five hundred dollars, to be paid to the said city of Chicago and the county of Cook, or their successors, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, by these presents. In witness whereof the said Thomas Tilley and William B. How-

ard have hereunto set their hands and seals this 20th day of September, A. D. 1880.

Whereas the above-named Thomas Tilley hath prosecuted a
40 writ of error to the Supreme Court of the United States to reverse the judgment rendered by the circuit court of the United States for the northern district of Illinois in the above-entitled suit:

Now, therefore, the condition of this obligation is such that if the above-named Thomas Tilley shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

THOMAS TILLEY. [SEAL.]
WILLIAM B. HOWARD. [SEAL.]

Approved.

H. W. BLODGETT,
Judge.

(Endorsed:) Filed September 20, 1880. Wm. H. Bradley, clerk.

41 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Thomas Tilley is the plaintiff and the County of Cook and the City of Chicago are the defendants, as the same appears from the records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 11th day of October, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the 105th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

42 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is before you in said circuit court, between Thomas Tilley and the County of Cook and the City of Chicago, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Thomas Tilley, as by his complaint appears; and it is being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1880, in the Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme

Court of the United States, this tenth day of April, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the 104th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsed:) Supreme Court of the United States. Thomas Tilley vs. The County of Cook and The City of Chicago. Writ of error.

43 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To the City of Chicago & the County of Cook, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1880, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Thomas Tilly is plaintiff, and you are the defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy ustice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, judge presiding on trial of said cause, this thirteenth day of September, in the year of our Lord one thousand eight hundred and eighty.

H. W. BLODGETT, *Judge.*

44 Service of the within citation admitted this 13th day of September, 1880.

FRANCIS ADAMS,
Att'y for City.
C. H. WILLETT,
Att'y for County.

(Indorsed:) Supreme Court of the United States. Thos. Tilly vs. The City of Chicago, The County of Cook. Citation. To October term, A. D. 1880.

(Indorsement on cover:) No. 1035. Thomas Tilley, plaintiff in error, vs. The City of Chicago and The County of Cook. N. Illinois. Filed 18th October, 1880.

IN THE

SUPREME COURT OF UNITED STATES,

THOMAS TILLEY,
Plaintiff in Error,

vs.

THE CITY OF CHICAGO AND THE COUNTY OF COOK,
Defendants in Error.

Error to Circuit Court, Northern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

MELVILLE W. FULLER,
For Plaintiff in Error.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET
1881.

IN THE

SUPREME COURT OF UNITED STATES,

THOMAS TILLEY,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO AND THE COUNTY OF COOK,
Defendants in Error.

Error to Circuit Court, Northern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

MAY IT PLEASE YOUR HONORS:

This is an action of assumpsit brought by the plaintiff in error against the defendants in error to recover for the value of certain plans made and furnished, and certain work and labor performed by him as an architect.

The case was virtually taken away from the jury by the court below, and the errors assigned mainly involve the correctness of rulings upon the questions of evidence.

Statement of Facts.

The block of ground in the city of Chicago known as the court house square, belongs to the county of Cook, in which said city is situated, and prior to the great fire of October, 1871, had been occupied by a building used as a city hall and county court house, in which the business of both county and city was conducted.

On the 10th of July 1872, the board of county commissioners, and on the 15th of July, 1872, the common council of the city of Chicago, adopted certain resolutions which had been theretofore recommended by a joint committee of both boards, authorizing the building committees of the boards to offer a prize of $5,000 for the best plan, $2,000 for the second, and $1,000 for the third best plan for a court house and city hall, "to be erected jointly "by the county of Cook and city of Chicago, upon the "public square in the city of Chicago," and the corporation counsel and county attorney, were directed to draw a contract for the use of the west half of the court house square, and the building to be erected thereon. (Printed Record, pp. 10, 11.)

On the 5th day of August, 1872, the city council and the county board, each passed an order approving of a joint contract between the city and the county, which contract was duly executed August 28, 1872, and provided among other things, that as it was desirable to have the city hall and county court house together, the county and city should join in the erection of a public building on the square in question, the city to erect at its own expense and to occupy that portion of the said building, west of the north and south central line of the block.

(P. Rec., pp. 11, 13.)

On the 25th day of November, 1872, the building committees of the common council and the county board, published advertisements for plans for the proposed building in contemplation, offering premiums of $5,000, $2,000, and $1,000, for the best plans, respectively. It was provided that each design should have a device or motto and be accompanied by a sealed letter giving the name of the author, " which will be opened after the final award is made, " only for the purpose of ascertaining the names of the " successful architects, and for the return of the unsuccess- " ful drawings to their authors."

(P. Rec., p. 15.)

It was also provided that each competiter should give " the cubical contents of his building and an estimate " of the cost of the same, complete."

The prizes were awarded by the committee to Messrs. Matz, Gay and the plaintiff, Tilly, the latter receiving the third prize of $1,000, and on the 18th of August, 1873, the common council passed a resolution approving the award with this proviso: " Provided that nothing herein " or in said report contained, shall be construed as indicat- " ing a preference for either of said plans, as to which shall " be finally adopted, from which the said building shall be " erected," and on the 4th of April the county board passed a substantially similar resolution.

The plaintiff was accordingly paid the amount of the third prize.

August 25, 1873, the county board adopted the following resolution:

"*Resolved*, That the plan known as ' Eureka ' or ' Num- " ' ber Five,' in the collection submitted for court house " and city hall be, and is, hereby selected and adopted as " the plan after which to build such court house and city " hall, the common council of the city of Chicago concur-

" ring, subject to such changes and modi cations as may " hereafter be determined upon by the common council " of the city of Chicago, and this board. *Provided*, the " estimate of the architect who has presented the said plan " as to the cost of the construction of the building shall be " verified."

And on the 10th of October, 1873, the common council adopted said resolution.

(P. Rec., p. 16.)

It appeared in evidence that the plaintiff was an architect of fifteen years' standing; that he prepared the plans known from the motto he used as the "Eureka" plans; that after the passage of the last mentioned resolution by the council and the county board, plaintiff verified the cost of the construction in the way customary and usual with architects, which was made up at the rate of thirty-five cents a cubic foot for the building, and was endorsed by some fourteen or fifteen architects; that this is the way the cost of different public buildings throughout the United States is estimated, and is a proper basis for such estimate.

The verification was furnished to the common council and the county board as soon as it could reasonably be prepared, and within two weeks of October 10th, 1873, when the common council concurred with the county board in the adoption of the resolution.

It was accompanied by bids by competent builders as well as the endorsement of the architects. It embraced every detail as to area and contents, and the itemized cost of masonry, cut stone, iron work, carpentering, plumbing, etc., heating, etc., plate glass, painting, tiling, marble work, prismatic lights, lightning rods, statuary, etc. (P. Rec., p. 17.)

All the "Eureka" plans, being complete plans for the building, were then produced, and evidence offered to

prove their value. To the introduction of this evidence defendants objected. The court sustained the objection, and refused to admit the evidence, and plaintiff excepted.

The plaintiff offered evidence to prove the time taken and the expenses incurred in the preparation of the plans. To the introduction of this evidence the defendants objected, and the court sustained the objection and refused to admit the evidence, and plaintiff excepted.

Plaintiff offered evidence to prove that, by the usage and custom of architects, in the absence of a special contract, the superintendence of the construction of a building belongs to the architect whose plans are adopted. To the introduction of this evidence the defendants objected, and the court sustained the objection and refused to allow the evidence to be introduced, and plaintiff excepted.

The plaintiff also offered evidence to prove the usage and custom of architects that where prizes are offered for plans, the plans of the successful competitors belong to them, and if subsequently adopted as the plans to build by, are always paid for in addition to the prize itself. To this the defendants objected, and the court sustained the objection and refused to admit the evidence, and plaintiff excepted.

The plaintiff also offered evidence to establish the value of the services rendered in verifying the cost of the proposed building according to the "Eureka" plans. To which defendants objected, and the courts sustained the objection and refused to admit the evidence, and plaintiff excepted.

The plaintiff then rested his case, and the court instructed the jury to find for the defendants. To which plaintiff excepted. The jury so found, and plaintiff moved for a new trial, which was overruled, and judgment rendered on verdict for defendants. To all which plaintiff duly excepted.

Assignment of Errors.

I.

The court erred in refusing to admit the evidence offered by plaintiff to show the value of the plans prepared by him, and to admit the evidence offered to show the time taken and expenses incurred in the preparation of those plans, and in sustaining defendants' objection thereto.

II.

The court erred in refusing to admit the evidence offered by plaintiff to establish that by the usage and custom of architects, in the absence of a special contract, the superintendence of the construction of a building belongs to the architect whose plans are adopted.

III.

The court erred in refusing to admit evidence to establish the usage and custom of architects, that where prizes are offered for plans, the plans of the successful competitors belong to them, and if subsequently adopted as the plans to build by, are always to be paid for in addition to the prize itself, and in sustaining defendants' objection thereto.

IV.

The court erred in refusing to admit evidence to establish the value of services in verifying the cost of the proposed building, according to the "Eureka" plans.

Points and Argument.

I.

THE COURT ERRED IN REFUSING TO ADMIT EVIDENCE OF THE VALUE OF THE PLANS OR THE TIME TAKEN AND EXPENSES INCURRED IN THEIR PREPARATION.

The city and county had agreed to erect a public building. They advertised for plans in competition. They awarded and paid three prizes, but expressly provided that the awarding of the prizes should not bind them to build by the successful plans. (P. Rec., p. 15.)

They then adopted the plaintiff's plans, if the cost as given could be verified. This verification was made by the plaintiff in the usual and customary mode, and in due time, and the verification was furnished them, and so far as appears, was satisfactory.

By that verification the plaintiff accepted the resolutions of the defendants and fulfilled the conditions, if requiring such verification amounted to a condition.

Why then was not the plaintiff entitled to recover for the value of the plans?

The advertisement of prizes is only to induce competition and afford the employer the largest opportunity to make a satisfactory choice. But those who compete render their work, skill and materials, not simply in the hope of securing the prize offered, but upon the implied promise that if the results of their labors are adopted, they will be paid for in full, and that further employment follows thereupon. As, for instance, in this case, the plaintiff prepared elaborate plans at great expense (probably eight to ten thousand dollars) for an extensive public building, not simply that he

might get $5,000 or $2,000, or $1,000, but the full value of his work and skill, and materials, by the adoption of the plans by the defendants.

First Unitarian Church v. *Faulkner, et al.*, 91 U. S. (1 Otto), 415, is exactly in point.

There some architects sued for $2,730 for original designs, $700 for second designs, $700 for modification of second design, and $400 for a third design. They recovered $2,900, which judgment was affirmed by this court. This judgment included, therefore, an allowance for the first designs.

The original designs were presented in competition, and it was assumed in the charge of the Judge that the plaintiffs could not recover if the plans had been rejected. The question really was whether the plans had or had not been adopted. It was conceded that the church was not constructed according to the plans, but the defendant was held liable, upon the ground of the acceptance of the plans.

In the case at bar there is no evidence whether the plans were used or not, nor is it material, because if plaintiff rendered the work, skill and materials, in consideration that if the plans were adopted he should be paid therefor, which is the exact legal effect of what was done, then he is entitled to recover, and evidence of either value or cost was admissible.

The Circuit Court seemed to suppose that the offering and awarding of prizes made a difference, or, in other words, that because the plaintiff was awarded the third prize of $1,000, the plans therefore *belonged* to the defendants. Clearly, this cannot be so.

If a county agricultural society offers a prize for the best bull, can it be possible that the bull which won the prize would belong to the society?

The consideration for prizes for plans is the opportunity of selection, but when the selection is made, why should not the plans be paid for?

The Circuit Court referred to the terms of the advertisement as giving color to the idea that the plans of the successful competitors would belong to the defendants.

The language was: "Each design must have a de-
"vice or motto marked on each drawing, and be accom-
"panied by a sealed letter giving the name of the author,
"which will be opened after the final award is made, only
"for the purpose of ascertaining the names of the success-
"ful architects, and for the return of the unsuccessful
"drawings to their authors."

The Circuit Court suggested that by implication the plans of the successful competitors were *not* to be returned. But the clause justifies no such construction. It was inserted *diverso intuitu*.

As each plan was distinguished *only* by a motto, it was absolutely necessary to open the sealed letters bearing the mottos of the successful plans, in order to get the names of the persons entitled to the prizes, and the authorship being thus ascertained, the plans could, of course, be returned if not adopted. But as to the *unsuccessful*, it was necessary to open their letters for the *sole* purpose of returning the plans, and hence the clause quoted assigned that as the reason, and assigned none as to the successful, because it was obvious as to them that the envelopes must be opened.

Inasmuch as the evidence offered was competent and material, it is submitted that for this error the judgment ought to be reversed.

II.

THE COURT ERRED IN REFUSING TO ADMIT EVIDENCE TO ESTABLISH THE VALUE OF SERVICES IN VERIFYING THE COST OF THE PROPOSED BUILDING ACCORDING TO THE PLAINTIFF'S PLANS.

The defendants had adopted the plans, "*provided the "estimate of the architect who has presented the said plan "as to the cost of the construction of the building shall be "verified.*"

The plaintiff, upon the passage of the resolution of adoption, proceeded to verify, and did verify, the cost in the way customary and usual with architects, and presented the verification with the accompanying endorsement of fourteen architects, and the bids of good and responsible contractors for every part of the work.

Yet the Circuit Court refused to admit evidence as to the value of services rendered in preparing this careful and elaborate verification, which was made in accordance with the defendants' own resolutions.

If the plaintiff were entitled to recover for nothing else, he certainly should have been allowed to prove the value of this work thus specifically directed to be done and furnished, and accepted without objection, so far as appears.

III.

THE COURT ERRED IN REFUSING TO ADMIT EVIDENCE TO ESTABLISH THE USAGE IN RELATION TO SUPERINTENDENCY.

The plaintiff offered to prove that it was the usage and custom, in the absence of a special contract to the contrary, that the architect whose plan was adopted, was en-

titled to superintend the construction. This evidence was rejected, yet it was manifestly competent. Proof of the custom in question was admitted in

Wilson v. *Bauman*, 80 Ill., 493.

And see *Lonergan* v. *Stewart*, 55 Ill., 44.

IV.

THE COURT ERRED IN REFUSING TO ADMIT EVIDENCE TO ESTABLISH THE CUSTOM IN RELATION TO OWNERSHIP OF PLANS WHERE PRIZES ARE OFFERED.

The plaintiff offered evidence to establish that where prizes are given for the best plans, the plans of the successful competitors belong to them, and it subsequently accepted as the plans to build by, are always to be paid for in addition to the prize itself.

If the court was right in ruling that without this evidence of usage, the successful plans would belong to the defendants, then the evidence was admissible. If the court was wrong in so ruling, then the evidence was perhaps inadmissible. But that the court was in error, on one or the other proposition, seems plain.

V.

In the examination of this record, it has occurred to me that there is doubt as to whether the plaintiff could have recovered against *both of these defendants in the same suit.*

But this is an objection that cannot be urged for the first time in this court.

The Circuit Court had excluded the plaintiff's evidence, so that there was nothing left to go to the jury against either defendant. It is provided in Illinois by statute as follows:

"At any time before final judgment, in a civil suit, "amendments may be allowed on such terms as are just

"and reasonable, introducing any party necessary to be "joined as plaintiff or defendant, *discontinuing as to any* "joint plaintiff or *joint defendant*, changing the form of the "action and in any matter, either of form or substance, in "any process, pleading or proceeding which may enable "the plaintiff to sustain the action for the claim for which "it was intended to be brought, or the defendant to make "a legal defense. The adjudication of the court allowing "an amendment shall be conclusive evidence of the iden-"tity of the action."

Ill. Rev. St., chap. 110, sec. 23.
Rev. St., Ill., 1874, p. 778.
Cothren's Statutes, p. 1006.

The objection in question was not raised by demurrer, or by plea of misjoinder, or by motion for a nonsuit. Had it been, the plaintiff might have amended, and so if a motion in arrest had been made. There was, indeed, no necessity to raise the objection, because the court, in effect, ruled that the plaintiff had no cause of action against anybody. But it ought not to be allowed now, when the plaintiff cannot obviate the consequences.

To affirm the judgment upon this ground would bar the plaintiff of recovery against either, though if the excluded evidence were admissible he has a cause of action against each.

If the Circuit Court committed no error in ruling upon the evidence, then the judgment will be affirmed. But if the Circuit Court did err, then the judgment should be reversed, with leave to the plaintiff to amend by discontinuing as to one of the defendants, if that be necessary.

Respectfully submitted.

MELVILLE W. FULLER,
For Plaintiff in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1880.

THOMAS TILLEY, *Plaintiff in Error,*
vs.
THE COUNTY OF COOK, AND THE CITY OF CHICAGO, *Defendants in Error.*
No. 1035.

Reply to Brief for Defendants in Error.

MELVILLE W. FULLER,
For Plaintiff in Error.

BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.

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Reply to Brief for Defendants in Error.

MAY IT PLEASE YOUR HONORS:

I.

The case of *First Unitarian Society* v. *Faulkner*, 1 Otto 415, seems to counsel for plaintiff in error exactly in point, and the careful attention of this court is carefully invited thereto.

II.

The question upon the record here is, ought not the excluded evidence or some part of it, to have been admitted?

But counsel for defendants in error say that the judgment should be affirmed whether the evidence was admis-

sible or not, upon the ground that the defendants were not *jointly* liable. If the evidence had been admitted, and the court had then instructed the jury to find for the defendants, because of the absence of proof of a joint liability, then the argument of counsel would apply. And in that case the plaintiff could have obviated the difficulty by discontinuing as to one or the other defendant. But the court had excluded all the evidence, as it was offered, so that there was nothing against *either* defendant.

The city and county were acting under a contract between themselves to build a building *jointly*. They ordered prizes to be offered by *concurrent* resolution. They advertised for plans in competition *jointly*. These plans were for a *single* building, not two buildings. They awarded the prizes by *concurrent* resolution and adopted these plans as the plans to build by, in the same way.

So far then as plaintiff is concerned, the contract was with the defendants jointly. But whether a judgment could in any case pass against a municipal corporation like a city, and a *quasi* corporation like a county, is a question that did not arise here, because the action of the court had left nothing upon which it could be presented.

If the evidence was admissible against both the defendants, or either of them, it should have been admitted. Being admitted, the question would then for the first time arise as to whether there could be a recovery against both. If the defendants then moved for a nonsuit or demurred to the evidence, that would have presented the point; and if the plaintiff had then chosen to abide by the case he had made, and not amend or discontinue as to either defendant, he would have been compelled to stand or fall by it; but that is not at all this case. How can a party be called upon to elect as between two, when the court holds there is no case against *either?*

III.

As to the City.

It is insisted that the Common Council had no power, by adopting plaintiff's plans, to bind the city to employ plaintiff to *superintend* the construction of the building in question, because it is said that payment for superintendence is part of the expenses of the work, and if such expense exceeds five hundred dollars, the particular work must have been, under the then city charter, let to "*the "lowest reliable and responsible bidder.*"

It will be perceived that this objection, *in terms*, only goes to the evidence of the custom as to superintendence. It is not objected that the *plans* ought not to have been paid for. It is an attempted answer to the second error assigned, but not to the first.

It is certain that as to the plans the city cannot be permitted to raise the objection of *ultra vires.*

Mr. Dillon, in his work on municipal corporations (§39) speaks of their governmental, legislative, or public character; and also of their proprietary or private character. While in the exercise of the former, the corporation is a municipal government, and while in the exercise of the latter, it is a corporate legal entity. (*Loyd* v. *Mayor*, 1 Selden, 369.)

Having power to build markets, it is authorized to employ an architect to prepare plans and specifications. (*Peterson* v. *Mayor, &c.*, 17 N. York, 449.)

A city "is bound by its acts and conduct as an indi-"vidual or private corporation. It is impliedly bound and "liable whenever *justice demands* it to be." Field, J. (*Gas Co.* v. *San Francisco*, 9 Cal., 469.)

That where there is power in reference to the subject

generally, the city may made all the contracts and do all the acts an individual may do. See

City of Galena v. *Corwith*, 48 Ill., 423.
People v. *Cairo*, 50 Ill., 154.
U. S. Bank v. *Danbridge*, 12 Wheaton, 61.

That corporations are liable upon implied contracts, even where it is required that they should be express, is too well settled for dispute.

Maher v. *Chicago*, 38 Ill., 266.
Pixley v. *R. R.*, 33 Cal., 183.
Argenti v. *San Francisco*, 16 Cal., 255.

The city having offered prizes for plans, in competition, upon the understanding that not only the prize but the adoption of one of the plans to build by, was involved, and the plaintiff having competed, and prepared his plans, at great expense, their adoption bound the city, as for an executed consideration, and the plea of *ultra vires* can not be availed of.

If the city had said, to a single architect: "Prepare a "set of plans, and if we approve them, we will adopt and "pay for them," and he had then prepared them, and they were adopted, would not the city be bound to pay for them?

But the provisions of the city charter referred to have no application.

Neither artists nor architects are employed under contracts, let to the "highest bidder." Such a construction would prohibit the obtaining of artistic or scientific skill.

The charter was not intended to require competitive bids under such circumstances.

Hobart v. *Detroit*, 17 Mich., 246.
1 Dillon on Mun. Corp., § 389, and notes.

The awarding of contracts to the lowest "*reliable and*

"*responsible* bidder" has relation to contracts for the erection of public buildings, or the carrying on of public improvements, but not to the scientific and artistic skill which plans them.

Again, the special city charter was *never put in evidence*. It was a private law, and not read on the trial, or any part of it, and should not be considered by this court. It is true the act *itself* provides that it shall be deemed a public act, and so "may be read in evidenc without proof," but in this instance it was not read.

It is also asserted by the corporation counsel that the Circuit Court held that there was no joint undertaking by the defendants, and also held that the passage of the *concurrent* resolutions was not evidence of a joint promise or undertaking.

There are no such rulings in this record, while on the contrary, those which disposed of the case were predicated upon the view that there was no competent evidence offered against *either* of the defendants, and *therefore*, as we have previously said, the objection indicated by counsel was never reached. If the court *had* ruled that the *concurrent* resolutions were not evidence of a joint promise or undertaking, the ruling would have been in itself erroneus.

IV.

As to the County.

The principal position taken by the County Attorney, is that the concurrent resolutions adopting the plaintiff's plans did not create a contract.

What are the facts? The city and county advertised for plans in competition. They held out to the competitors, not simply to pay the prizes, but to adopt the plans of one

of them. The hope of the adoption of the plans was the chief inducement to each of the competing architects. The plaintiff, having expended his time and money in the preparation of plans, upon the faith that, if adopted, they would be paid for, the defendants, having adopted them, are liable.

In the case of proposals to do public work the acceptance of the proposals completes the contract.

1 Dillon, § 392.

And it is settled law that the authorized body of a municipal corporation may bind it by an *ordinance* or *resolution*.

1 Dillon, § 374, and notes.

The resolutions in this case are positive and specific. They select and adopt the plaintiff's plans, which they had requested him to prepare, and they thereby appropriate the fruits of his labor. It is absurd to argue that Mr. Tilley did not request the adoption of his plans.

Nor do we perceive the force of counsel's assertion that "consideration and mutual assent" are wanting to the contract with the plaintiff.

He expended skill, labor and money in faith of receiving compensation *if* his plans were adopted. The defendants who had offered this compensation, did adopt the plans. What element of a binding contract is lacking?

The court will also remember that the plaintiff offered evidence to establish the usage and custom of architects, that where prizes are offered for plans, the plans of the successful competitors belong to them, and if subsequently adopted, as the plans to build by, are always to be paid for in addition to the prize itself. This evidence was excluded and the exception is presented in the the third error assigned.

What counsel means by saying "the offer of plaintiff's

"evidence alone was not sufficient to open the door to evi-"dence of usage," I do not know. The record is that plaintiff offered "evidence," to establish the custom, not his evidence, not the evidence of a single witness, but evidence generally. He had in fact a dozen witnesses in attendance.

There is no dispute as to the proper office of a custom or usage.

The language of Judge BREESE in *Lonergan* v. *Stewart*, 55 Illinois, 51, as cited by counsel gives the rule correctly. No rule of law can be contravened, and no *express* contract varied in its terms by usage, "yet *all* contracts "made in the ordinary course of business, without partic-"ular stipulations, expressed or implied, are presumed to "be made in reference to any existing usage or custom "relating to such trade, and it is always competent for a "party to resort to such usage to ascertain and fix the "terms of the contract."

"The known and received usage of a particular trade or "profession, and the established course of every mercantile "or professional dealing, are considered to be tacitly an-"nexed to the terms of every mercantile or professional "contract made in the ordinary course of business in which "the usage prevails, if there be no words therein expressly "controlling or excluding the ordinary operation of the "usages; and parol evidence thereof may, consequently, be "brought in aid of the written instrument."

Addison on Contracts, § 244.

In the case at bar the defendants invited proposals from architects and accepted the plaintiff's. Surely, he was entitled to establish in aid of the contract so created such usages as prevail in the course of that kind of professional business.

And if there could have been any question upon this particular point, the evidence of usage would have set it at rest at once.

VI.

The resolutions adopted the plans provided the estimate of the architect, "*as to the cost* of the construction of "the building shall be verified."

Each set of plans as proposed was accompanied by an estimate of the cost of the construction.

This estimate was to be verified, that is, confirmed as to its accuracy.

The usual and customary way to obtain such verification was shown to be by procuring the certificate of architects, and also *bona fide* bids of responsible bidders. All this was done by the plaintiff, and the verification received without objection.

This was not a voluntary act on the part of the plaintiff. It was the fulfilment of a condition imposed upon him by the defendants. Yet the Circuit Court would not even admit evidence of the cost or value of this verification, although plaintiff was put to the trouble and expense of getting it by what was equivalent to an express direction.

VII.

It is said that the fact that the resolution contained these words, "subject to such changes and monifications as "may hereafter be determined upon by the Common Coun- "cil of the city of Chicago, and this board," is conclusive that a contract was yet to be made before defendants were

bound. On the contrary, it demonstrates that the adoption of the resolution was considered to create a binding contract, and, therefore, the defendants desired to reserve the right to change and modify the plans as the work progressed, if they so desired.

Respectfully submitted,

MELVILLE W. FULLER AND
R. H. FORRESTER,
For Plaintiff in Error.

JAN 21 1881

Supreme Court of the United States.

No. 1035.

THOMAS TILLEY,

Plaintiff in Error,

vs.

THE COUNTY OF COOK and THE CITY OF CHICAGO,

Defendants in Error.

ARGUMENT OF COOK COUNTY.

In Error to the Circuit Court of the United States, for the Northern District of Illinois.

CONSIDER H. WILLETT,

Attorney for Defendants in Error Cook County.

CHICAGO:

CLARK & EDWARDS, Printers, 162-4 Clark St.

1881.

SUPREME COURT

OF THE

UNITED STATES.

THOMAS TILLEY, **Plaintiff in Error.** **vs.** **THE COUNTY OF COOK and THE CITY OF CHICAGO,** **Defendants in Error.**	**No. 1035.** *Error from Circuit Court, Northern District of Illinois.*

ARGUMENT OF COOK COUNTY.

STATEMENT.

This was an action in assumpsit by plaintiff, Thomas Tilley, an architect, against two municipal corporations. The pleadings consist of a declaration of a consolidated common count, and the plea of the general issue. No allegations are found in the pleadings about the breach of any special contract or the making of any contract by virtue of certain customs.

To show damages for breach of special contract or the making of a contract by usage required special counts.

The evidence fails to disclose any contract, or the doing of any work or furnishing any materials at the request of either defendant. Without a contract, express or implied, between the parties no custom could be introduced in evidence to explain or control an assumed contract. The foundation upon which to introduce evidence of a custom was wanting.

The utmost that can be claimed of the evidence introduced and sought to be introduced is, that preliminary steps looking towards the making of a contract were taken. A collective party (fifteen County Commissioners) sought by legislative action to ascertain the intention of its own mind. The passage of a resolution was the only method open to seek such knowledge.

This Court, by an examination of the facts of the record, will see that, although there were competitive plans, among which three prizes were awarded, yet the awarding of such prizes was an end of that transaction. The payment of $1,000 to Tilley as the third prize settled that matter. (Ab. p. 15.) From such time forward we should look at the acts of the parties as constituting another transaction.

The mere adoption of the resolution of August 25, 1873, (found on page 8 of this brief) by the County of Cook to the effect that the "Eureka" plan be "selected and adopted as the 'plan after which to build such Court House and City Hall," created no contract. (Ab. p. 16.)

The resolution was not passed at the request of Tilley. Nor did he at the request of the County or City do any act to

verify the cost of such plans. (Ab. p. 16 and 17.) Such verification was the voluntary act of plaintiff and could create no liability.

The contract between the County and City (Ab. p. 11) makes express provision that the County shall erect a court-house on the east half of the block and the City a city-hall on the west half of the block. The talk of erecting such buildings jointly is found only in the advertisement for competitive plans; when the contract was made it fixed the status of the parties and made no reference to a joint building but to two separate ones of uniform exterior design. The contract makes clear that there shall be no joint liability on the part of the County and City in relation to any matter connected with these two buildings. The County owned the land and made the contract to bring the city and county business near each other and to secure a finer building of uniform exterior design. The obligations and the conduct of the County and the City show their several liability which the law gives primarily and which they sustain by all their acts. The evidence given and offered makes no attempt to show any privity by contract or law of the county and city. All of the testimony could well have been rejected on this ground solely.

The County and City act each for itself and create no joint liability except the payment of prizes which is a transaction closed. (Ab. p. 16, R. p. 33.]

This case stands upon the naked resolution of the Board of Commissioners of Cook County of August 25, 1873, (Ab. p. 16) without its passage by the request of Tilley or the doing of any act by him as an inducement to its passage. After such expression of opinion as is contained in such resolution nothing

was required of Tilley or done by him at the request of the County.

The resolution was but the expression of an opinion of a legislative body, to wit, the Board of Commissioners of Cook County. Nothing was done outside the members of such legislative body among themselves to secure its adoption, and it required nothing to be done without further action, and no act was done because of its passage.

There are some constitutional and statutory provisions which the law keeps constantly in force to limit the power of making contracts by county authorities.

ILLINOIS CONSTITUTION.

The county affairs of Cook County shall be managed by a Board of Commissioners of fifteen persons * .—*Ills. Const.* 1870, Art. 10, § 7.

County authorities shall never assess taxes, the aggregate of which shall exceed 75 cents per $100 valuation, except for the payment of indebtedness existing at the adoption of this Constitution, unless authorized by a vote of the people of the county.—*Ib.* Art. 9, § 8.

No county, city, township, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose, to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and County Taxes, previous to the incurring of such indebtedness. Any county, city, school

district, or other municipal corporation, incurring any indebtedness as aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof, within twenty years from the time of contracting the same. This section shall not be construed to prevent any county, city, township, school district, or other municipal corporation, from issuing their bonds in compliance with any vote of the people, which may have been had prior to the adoption of this Constitution, in pursuance of any law providing therefor.—*Ib.* § 12.

STATUTES OF ILLINOIS.

Each county * * shall be a body politic and corporate * * may sue and be sued * *—*Ills. R. S.*, 1847, p. 306, Chap. 34, § 22.

The power of the county as a body corporate or politic shall be exercised by a County Board. —*Ib.* § 23

Each county shall have power to make all contracts and do all the acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers.—*Ib.* § 24.

The County Board shall have power * * 2d. To manage the county funds and county business, except as otherwise specifically provided. 3d. To examine and settle all accounts against the county and all accounts concerning the receipts and expenditures of the county. 6th. To cause to be annually levied and collected taxes for county purposes, including all purposes for which money may be raised by the county by taxation, not exceeding 75 cents on the $100 valuation, and in addition thereto an annual tax not exceeding one hundred cents on the $100,

for the purpose of paying the interest and principal of indebtedness which existed at the time of the adoption of the Constitution.—*Ib.*, § 25.

It shall be the duty of the County Board of each county to erect or otherwise provide, when necessary, and the finances of the county will justify it, and keep in repair, a suitable Court House, &c.—Ib., § 26.

The said Commissioners shall take the oath of office prescribed by the Constitution. They shall have regular meetings on the first Mondays of December, March, June and September of each year. They shall be known as "The Board of Commissioners of Cook County," and as such Board of Commissioners shall have the management of the county affairs of said county, and shall exercise the same powers, perform the same duties, be subject to the same rules, regulations and penalties as prescribed by law for the Board of Supervisors.—*Ib.*, § 62.

The County Clerk of Cook County shall be clerk of the Board of County Commissioners; and all laws applicable to the county clerks of other counties under township organization shall be applicable to him.—*Ib.*, § 63.

The annual meetings of the Board of Supervisors shall be held on the second Tuesday of September of each and every year, at the county seat; and if the court house be convenient, shall be held therein. A regular meeting of the Board shall be held on the second Monday of July of each and every year, at the county seat, and at such other times as may be prescribed by law.—*Ib.*, § 50.

A majority of the Supervisors of any county shall constitute a quorum for the transaction of business; and all questions which

shall arise at meetings shall be determined by the votes of the majority of the Supervisors present, except in such cases as is otherwise provided.—*Ib*, § 54.

The principle will not be questioned that Cook County, which acts by its Board of County Commissioners, is a corporate authority created by the Constitution of the State of Illinois, and that statutes which are not inconsistent with such constitutional provisions concerning Cook County, control said corporate authority.

The County Commissioners having power to do only such things as are expressly granted by such statutes, the act creating counties becomes at once their grant and their limitation of power.

We must look at the statutes to see what they can do and the way in which they must do it.

An examination of such constitutional and statutary provisions show that Cook County never made any contract with Tilley.

ANSWER TO PLAINTIFF'S POINTS.

I.

DID THE COURT ERR IN REFUSING EVIDENCE OF THE VALUE OF THE PLANS?

To answer this question we must bring all the facts to our minds. Three plans were prepared (in fact over thirty) under a joint resolution and advertisement of the County and City for a court-house and city-hall. The three prizes were $5,000, $2,000 and $1,000, the third being given to the plaintiff under resolution containing the following words: (Ab. p. 15) "but nothing

'in this resolution shall be construed so as to express a prefer-'ence for any plan to build the court-house by." The plaintiff was paid this prize which, we claim, under the facts of the advertisement and competition was the value of these plans. The conduct of the parties made this prize the measure of damages as to the value of the plans.

No contract could be more fully consummated than this one. The payment of the prizes put all questions concerning the competing plans at rest. The prizes and all their details ended when awards and payments were made. If plaintiff can sustain a cause of action at all it must rest upon the following resolution adopted by Cook County, August 25, 1873, to wit:

"*Resolved*, That the plan known as Eureka, or number 'five, in the collection submitted for court-house and city-hall, 'be, and is hereby, selected and adopted as the plan after which 'to build such court house and city-hall, the Common Council 'of the city of Chicago concurring, *subject to such changes and 'modifications as may hereafter be determined upon by the Com-'mon Council of the city of Chicago and this Board*, provided 'the estimate of the architect who has presented the said plan 'as to the cost of the construction of the building shall be veri-'fied." (Ab. p. 16, R. p. 34.)

This resolution was the voluntary act of the Board of Commissioners of Cook County. Tilley was not present when it passed, nor did he request its adoption. The resolution stands by itself and shows upon its face that it is merely an expression of opinion as to preference of plans. It has not the appearance and does not make the pretension to be a contract.

The resolution stood upon the same footing as if it had

declared that Cook County should build a court-house like the one in St. Louis or Milwaukee. Could the architect of such court-house in St. Louis claim the resolution to to be a contract with him? If not, then no contract had been introduced in evidence, and all evidence refused was properly rejected.

These plans had all been made public by an exhibition at which the world was at liberty to copy them. They were as accessible to the world at large as the St. Louis Court House.

The object of the prizes was to make such plans public and to vest an ownership of their use in Cook County.

The offering of the prizes and their award constituted the consideration, to give the County of Cook the right to use such plan, if it saw fit, in the construction of its Court House.

To have constructed the Court House after the "Eureka" plan would have constituted no cause of action on the part of Tilley. The county had the right to make such proper use of such plans. The plans were like a prize essay. The payment of the prize created ownership in Cook County of the plans. The prize of an agricultural society for the best bull is strangely applied by plaintiff's counsel. The object of the agricultural society is to encourage the breeding of good stock, to let the public know the best species and to bring a crowd to the fair. The agricultural society pays the prize to learn the facts as to the best individual bull If the same society offered prizes for essays as to the best way of breeding bulls, can any one doubt but that it would be proper for such prize essay to be printed with the published transactions of such agricultural society?

By an examination of the decision in First Unitarian Soc. v. Faulkner, 91 U. S. 415, we are confident this Court will dis-

tinguish it from the case at bar. There were different elements in that case which led to different results. This appears from the words of Clifford, J., p 420.—

"The judge instructed the jury, that if what the business "partner of the firm did, after the qualified acceptance of his "plan, was done upon the same conditions under which the "various competing plans were originally submitted, then the "plaintiffs could not recover;" (which seems to be the case at bar and adverse to plaintiff here.) "Nor could they recover "upon the theory that it was understood between the parties "that, in case the plan of the plaintiffs should be ultimately re-"jected, as in fact it was, they were to have a reasonable com-"pensation for their services." (Which also is adverse to evidence of value of plans and verification in this case.) "By which "is meant, as the Court here understands the matter, that there "was no sufficient evidence in the case to prove such an express "agreement. He also instructed the jury that the defendants "were *only* liable for the acts of agents duly authorized, or for "acts of persons subsequently ratified by the society."

The presumption is conclusive that the plans were not used by the county or city. Evidence of a fact must be proved or an offer made to prove it before any ground is laid for any pretense to claim that the plans were used. In fact, as shown by the record, the only use ever made of the "Eureka" plans was to put them on exhibition and pay their author, Tilley, the third prize.

II.

VALUE OF VERIFYING PLANS.

The counsel for plaintiff discuss this point (Plaintiff's brief, p 10) as though it was services rendered at the request of de-

fendants. This position is satisfactorily controverted by quoting the second assignment of error (Plaintiff's brief, p. 6.)

"The Court erred in refusing to admit the evidence offered "by plaintiff to establish that by the usage and custom of "architects, in the absence of a special contract, the superin- "tendence of the construction of a building belongs to the archi- "tect whose plans are adopted."

We shall discuss the law of usages and customs under the next point, and it will apply equally to this second assignment of error.

What are the facts about this verification? The instructions to the competing architects contained the following: "Each "competitor will give the cubical contents of his building and "an estimate of the cost of the same completed." (A., p. 15) The estimate of cost was furnished with the plans originally, in accordance with this condition (A., p. 16 and 17.)

If Tilley did any subsequent act it was to procure the endorsement of such estimate by obtaining the signatures of fifteen architects. (A, p. 17.)

The absurdity of the estimate is apparent. The directions required "the cubical contents of his building," to see if such space would meet the needs of the county and city officials in the transaction of public business. The estimate of the cubical contents at so much a cubic foot was a curious blunder, as a mere statement of estimating by the cubic foot lightning rods, statuary, decorations, plumbing, etc., will show. An inspection of the resolution establishes the fact that the verification required was one to be determined by some joint resolution of the county and city. Tilley was not asked to do anything more by the

resolution or otherwise. His voluntary acts are void acts. The county, wanting some test or verification of the verification, would naturally procure parties other than plaintiff to furnish such satisfactory verification in its own way and time.

III.

CUSTOM.

The office of a custom is to determine the meaning of words, phrases and latent ambiguities in contracts which the law conclusively presumes were made by both parties with full knowledge of and with reference to such customs.

It is an enlargement of the idea that words are used with such meaning attached to them as dictionaries give.

It becomes natural, as a preliminary inquiry, before we reach the question of customs, to know what is the contract upon which the usage is to be engrafted.

NO CONTRACT WAS ESTABLISHED; *therefore evidence of custom was properly excluded.* In our statement and first point we have commented upon this somewhat. The facts are undisputed that the contract, if it exists, must be found in the resolution of August 25, 1873 (A., p. 16.) Such resolution is only a statement of choice. It does not go to the extent of being a proposal. In itself, and in connection with all the offers of evidence made, it neither creates nor attempts to create a contract.

This resolution, if attempted to be construed as a contract, makes a promise without a consideration — a mere "*nudum pactum.*"

There was no mutuality between the plaintiff and the defendants and no privity between the defendants.

Without attempting to discuss philosophically all the principles governing contracts we urge that at least two essential elements are wanting when the plaintiff claims the resolution to be a contract, viz. consideration and mutual assent.

We seek in vain to find any consideration for the adoption of the resolution. There was no act done or suffered by the plaintiff which produced or contributed to such a result. It was a mere resolution, seeking to ascertain the idea of the majority of a collective body whose thoughts could be ascertained in no other manner. It was but the expression of an opinion. It would be strange indeed if the passage of such a resolution would be held to bind the County to expend millions of money.

"There is no contract unless the parties thereto assent; "and they must assent to the same thing in the same sense. X "* A contract requires the assent of the parties to an agree- "ment, and this agreement to be obligatory * * must be mu- "tual. This is sometimes briefly expresssed by saying that "there must be a 'request on the one side and an assent on the "other.' A mere affirmation or propositon is not enough. Nor "is this any more a contract if it be in writing than if spoken "only. It becomes a contract only when the proposition is met "by an acceptance which corresponds with it entirely and ade- "quately."

1 Par. on Con. (5 Ed) p. 475.

If one part does not accede to a promise as made the other party is not bound by it.

Tuttle v. Love, 7 John. 470.

When A signs a writing by which he declares he will sell to B, his house &c., at a certain price &c.; this is a new proposition, and not a contract.

Tucker v. Woods, 12 John. 189.

In Livingston v. Rogers, 1 Caines, 584, Kent, J., said: "This is a case of mutual promise when the one is intended to "be the consideration for the other. It is a well settled rule, "that in such cases, the promises must be stated to have been "made at the same time, otherwise the one antecedently made "will be without consideration, and consequently not sufficient "to support the other. The question here is, whether a valid "promise loid, on the part of the plaintiff so as to form a con-"sideration for that on the part of the defendant. Hobart (88) "uses the strong language that the promises must be at one "instant, or they are *nude pacts*. It was once held, in How-"lett's case, Latch, 150, that to lay the defendant's promise "*afterwards on the same day*, was sufficient; because the court "would not allow of any division in a day. But in other re-"spects that case is not altogether applicable. There the de-"fendant's promise was in consideration of an antecedent sale "and delivery in part; and the point advanced, of not allowing "a division in a day. In Cooke v. Oxley, 3 D. & E. 653 it was "decided, that if one party has till a different time of the same "day to assent to the agreement, the other party is not held to "his prior promise, and the promises are *nuda pacta*. It is "clear therefore, from this last decision, and from the reason of "the thing, that mutual promises, where one is the considera-"tion of the other, must be made not only on the same day, "but at the same time; they must be concurrrent engagements."

In Wood v. Edwards, 19 John. 205, where A wrote that he

had agreed to a substitute for an existing agreement which he would execute, Spencer, C. J., said "the proposition of E to "execute the new agreement was not binding on him as well "on the ground of a want of consideration as a want of mutuality "since the plaintiffs on their part were not bound to execute the "agreement."

In Kingston v. Phelps (Peak's Rep., p. 227) the plaintiff proved that the defendant consented to be bound by an award to be made on a submission by other underwriters on the same policy, but the witness proved no agreement on the part of the plaintiff to be bound by the award. Lord Kenyon held that there was no mutuality, and, therefore, the defendant's agreement was a mere *nudum pactum.*

Keep v. Goodrich, 12 John. 397.
Webb v. Alton In. Co., 5 Gil. Ill. 223.
Philips v. Charleston Leg. Int, Phil. Feb. 4th, 1870.
McClay v. Harvey, 90 Ill. 525.

In this case there was no contract and therefore the evidence offered was improper.

CUSTOM.

The usage of any class of men cannot be established by the testimony of a single witness. Bissell v. Ryan, 23 Ill., 522, Bryne v. Byrne, 47 Ill., 507, Wood v. Hickok, 2 Wend. 501.

The offer of plaintiff's evidence alone was not sufficient to open the door to evidence of usage.

In Lonergan v. Stewart, 55 Ill., on p. 51, Breese, J., said, in deciding whether a transaction was a sale or bailment of corn: "Although it is true usages of trade cannot be set up either to "contravene an established rule of law, or to vary the terms of

"an express contract, yet *all contracts* made in the ordinary "course of business, without particular stipulations, expressed "or implied, *are presumed to be made in reference to any existing* "*usage or custom* relating to such trade, and it is always compe- "tent for a party to resort to such usage to ascertain and fix "the terms of the contract."

In Bissell v. Ryan, 23 Ill., 566, whose language is quoted in Wilson v. Bauman, 55 Ill., 493, cited by appellant, it was sought to establish a custom at Springfield for physicians to charge the head of the family for all medical services rendered members of the family as nieces. Breese, J., said: "The proper office of a "custom or usage in business is to ascertain and explain the "intent of the parties; and it cannot be in opposition to any "principle of general policy, nor inconsistent with the terms of "the agreement between the parties, or against the established "principles of law (cases cited.) Besides all, it must be gener- "ally known and established and so well settled and so uniform- "ily acted upon as to raise a fair presumption that it was known "to both contracting parties, and that they contracted in refer- "ence to it and in conformity with it. A usage * * cannot "be established by proof of one instance, but by an accumula- "tion of instances.

"It cannot be established by evidence of opinion merely. "(Cunningham v. Foreplanque, 25 Eng. C. L., 274.) * * * "In regard to a commercial usage the true test is its having ex- "isted a sufficient length of time to have become generally "known and to warrant a presumption that contracts are made "in reference to it. (Cases cited.) All the authorities concur in "saying that if usage is relied upon it must be shown to be "ancient, certain, uniform, reasonable and so general as to fur- "nish this presumption of knowledge by both parties. (Cases

"cited. Nor is a practice or usage contrary to the common "law, however general it may be of force in this State on the "ground of custom, because it is not immemorial, that being the "essential ingredient of a good custom."

No usage or custom can be admitted in evidence to vary or control the express terms of a contract, but they may be admitted to determine that which by the contract is left undetermined.

The reason why a custom or usage is permitted to be found in any particular case, is the presumption that from its antiquity, extent and universality it entered into and formed a part of the contract, and therefore its antiquity, extent and universality must be such as to warrant the conclusion that it was known to the contracting parties, and that they made their contract with a view to it.

Dixon v. Dunham, 14 Ill., 324.

In Turner v. Dawson, 50 Ill., 85, where commission merchants sued to recover advance and by custom interest Breese, J., said: "A custom to be binding must be uniform, long "established and generally acquiesced in and so well known as "to induce the belief that parties contracted with reference to "it when nothing is said to the contrary."

Customs to be clearly binding must be shown to have been acted on and controlled previous contracts between the parties. Home Ins. Co. v. Forreste, 47 Ill., 263. The usage of one locality no evidence of usage in another.

Strong v. King, 35 Ill., 9.

Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement.

Fay v. Shaw, 32 Ill., 295.

Parol evidence may explain what the entire scope of the intended written contract was, yet when that is arrived at it cannot explain, modify or control its terms by usage.

Ill. Fire Ins. Co., v. O'Neile, 13 Ill. 89.

As to customs generally see 2 Par. on Con. 5 Ed. p. 540, 1 Greenl Ev. § 292; Browne on the Law of Usages and Customs.

Munn v. Burch, 25 Ill., 35.

Fourth Nat. Bk. Chi. v. City Nat. Bk. Gd Rapids, 68 Ill., 398.

We reiterate our statement, that as no contract was shown, no, evidence of usage or custom was admissable.

IV.

CUSTOM AS TO OWNERSHIP OF PLANS WHERE PRIZES ARE AWARDED.

What we have said about customs under the last point is applicable here.

We did not use the plans of plaintiff or agree to do so, and such facts establish conclusively that evidence of ownership of plans was irrelevant.

V.

No evidence given or offered showed a joint liability on the part of the two defendant municipal corporations.

The plaintiff's counsel well may doubt whether his client could "recover against both of these defendants in the same suit." If there had been a contract between this plaintiff and these defendants then no such doubt could exist. The want of such contract creates the doubt and makes it certain that no joint liability existed, and that the evidence offered by plaintiff was properly rejected.

The law created no privity of contract between these defendants. No contract existed which created a privity of contract between these defendants. Therefore, in law or by contract no privity existed between the two defendant municipal corporations. Rejected evidence was offered to show a joint liability and therefore properly excluded.

VI.

The resolution of Aug. 25th, 1873, contained these words: "*subject to such changes and modifications as may hereafter be determined upon by the Common Council of the City of Chicago and this Board*," which words show conclusively that the county contemplated the making of a contract before it should consider itself bound by any action in reference to the plans.

We claim no error was committed by the court below and urge our affirmance of its judgment.

Respectfully submitted,

CONSIDER H. WILLETT,

Attorney for Cook County, Defendent in Error and County Attorney of Cook County, Ill.

SUPREME COURT U.S.
FILED
JAN 22 1901
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT OF UNITED STATES.

THOMAS TILLEY,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO, AND COUNTY OF COOK,
Defendants in Error.

Error to Circuit Court, for the Northern District of Illinois.

Brief and Argument for Defendant in Error

CITY OF CHICAGO.

FRANCIS ADAMS,
Corporation Counsel, for Defendant in Error

Wm. C. GOUDY,
Of Counsel.

BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.

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MAY IT PLEASE THE COURT:

This was an action of assumpsit by plaintiff in error against defendant in error, upon an alleged joint promise or undertaking by the defendants. It was therefore incumbent on the plaintiff to prove either an express promise or undertaking by the defendants, jointly, or circumstances from which the law would imply a joint promise. To entitle plaintiff to recover, it must also have appeared that the city of Chicago was capable of contracting in the *manner* in which the plaintiff claims it contracted.

I.

THE PLAINTIFF NOT ONLY FAILED TO PROVE A JOINT PROMISE, OR UNDERTAKING, ON THE PART OF THE DEFENDANTS, BUT SUCH JOINT PROMISE OR UNDERTAKING IS EXPRESSLY NEGATIVED BY PLAINTIFF'S EVIDENCE.

The building committee of the common council of the city of Chicago, and of the board of commissioners of Cook County, and the board of public works of the city of Chicago, advertised, jointly, for plans for the construction of a building on the public square, to be used jointly by the county and city, offering for the best plan $5,000, for the second best $2,000, and for the third best $1,000. (Rec. pp. 30–32.) The common council and the board of commissioners separately passed resolutions awarding the third prize to the plaintiff for the plan known as "Eureka" (Rec. p. 33), and the prize was paid to him. (Rec. p. 33.)

The common council of the city, and the board of commissioners of the county, each passed a resolution, awarding the prizes, and in each resolution occurs this language: "But nothing in this resolu- "tion shall be construed so as to express a prefer- "ence for any plan to build the court house by." (Rec., p. 33.)

The following resolution was passed by the common council, October 10, 1873, and by the board of commissioners, August 25, 1873,

"Resolved, That the plan known as Eureka, or "number 5 (five) in the collection, submitted for the "court house and city hall, be, and is hereby, se- "lected and adopted as the plan after which to build "such court house and city hall, (the board of com- "missioners of Cook County concurring), subject to "such change and modifications as may hereafter be "determined upon by the common council of the "city of Chicago, and the county board, provided "the estimate of the architect who presented said "plan as to the cost of construction of the building "shall be verified."

These resolutions are not proof of any understanding or agreement between the city and county, that they would jointly contract for, or jointly assume and bear the expense of the construction of the court house and city hall.

Turning now to the contract between the city and county in relation to the contemplated structure· Rec., 34, *et sequens*, we find it recited, in substance, that the county owns the court house square, a block of ground, bounded by four streets, subject to certain rights of the city in the west half of the block; that the city proposes to erect a city hall, and the county a court house; and that it is for the convenience of the public that the courts, and the city and county officers shall be located at one convenient point. The contract then provides, in substance, that the city and county shall join in the erection of a public building on the block, for the use of the county and city governments, the general ex-

terior design of the building to be of uniform character and appearance, &c., and provides expressly as follows:

3. "That portion of the said building situate "west of the north and south centre line of said "block shall be erected *by the city of Chicago, at its* "*own expense.*"

4. "The city of Chicago shall occupy that portion "of said block west of the said centre line for a city "hall, and offices incidental to the administration of "the city government, and for no other purpose "whatever, except as hereinafter provided."

5. "Each of the parties hereto will heat, light, "and otherwise maintain and furnish its *own* portion "of said building."

6. "The necessary expense of improving the "grounds around said building shall be paid equally "by the city and county."

The last is the only expense assumed equally and jointly by the agreement. Taking the whole agreement together, it is evident that it is an agreement to unite in the construction of a court house and city hall, only so far as may be necessary to secure a building having a general exterior design of uniform character and appearance, but that each party is to erect its own portion of the building, at its own expense.

The contract was made August 28, 1872, three months before the publication of the advertisement offering prizes for competitive plans.

The court held that there was no joint undertaking by the defendants, and also held that the passage by the common council, and by the board of commissioners, acting separately, and at different times, of the resolution adopting the Eureka plans, was not evidence of a joint promise or undertaking to employ the plaintiff.

Plaintiff's counsel impliedly, but perhaps unintentionally, intimates in his argument, that the objection that the defendants were not jointly liable, was not made in the court below. It was made by counsel for the city, in the opening of the case for the city, and the court, subsequently, called the attention of the counsel for the plaintiff to that point, expressly stating to them that, in the opinion of the court, there could not be a joint recovery against the defendants. I am willing to abide by what Brother Fuller may say as to the truth of this statement. The court being of this opinion, and the defendants having no further proof to offer on the point of joint liability, of course there was nothing left for the court to do but instruct the jury to find for defendants.

Plaintiff's counsel has cited the Illinois statute in relation to the amendment of pleadings. It is sufficient to say that plaintiff's counsel did not ask leave to amend, choosing rather to prosecute their suit against both defendants.

II.

THE COMMON COUNCIL OF THE CITY COULD NOT, BY THE ADOPTION OF THE PLAINTIFF'S PLANS, BIND THE CITY TO EMPLOY HIM, EVEN THOUGH THE CUSTOM OF ARCHITECTS WERE AS CONTENDED BY PLAINTIFF'S COUNSEL; VIZ., THAT "THE CONSTRUCTION OF A BUILDING BELONGS TO THE ARCHITECT WHOSE PLANS ARE ADOPTED."

The plaintiff's claim was, that, by the usage and custom of architects, in the absence of a special contract, the superintendence of the work belongs to the architect whose plans are adopted (Rec., p. 37).

In other words, the Common Council having adopted a plan, for which it had paid a prize, and which it had returned to the architect, such adoption *co instanti* became supplemented by the alleged custom of architects, and the city was bound to employ the plaintiff to superintend the construction of the building, precisely as if an express contract to so employ him had been made. The plaintiff alleges that the total estimated cost of the contemplated building was $2,909,629, and that on this amount he was entitled, under the alleged contract, to receive five per cent; viz., $145,481.45 (Rec., p. 9).

There is nothing in the record to show that the contemplated building was ever erected, nor was any evidence to that effect offered.

The claim, then, is, that there was an implied contract on the part of the city to employ the plaintiff to superintend the construction of the contemplated

building, and to pay him therefor the sum of $145,481.45.

At the time this contract is alleged to have been made, the city of Chicago was incorporated under an act entitled "An Act to reduce the charter of the "city of Chicago, and the several acts amendatory "thereof into one act, and to revise the same." Private Laws of Illinois, 1863, p. 40, and the amendments thereto.

Sec. 13 of chap. 17 of the act, *Ib.* p. 154, provides: "This act shall be deemed a public act, and may be "read in evidenee, without proof, and judicial notice "thereof shall be taken in all courts and places."

By the act an executive department of the municipal government was created to be know as the "Board of Public Works." *Ib.*, p. 74, chap. 6, sec. 1.

Among the prescribed duties of the board was the duty to take the special charge and superintendence of all public buildings in the city, and of all public improvements to be commenced after the passage of the act. Chap. 6, sec. 11.

Sections 15, 16 and 17 of chap. 6, provide how contracts shall be let and by whom, when a public improvement is ordered by the council, which is to be paid for by a special assessment, viz: by the board of public works, to the lowest reliable and responsible bidder, competitive bids having been previously invited by advertisement.

The last sentence of section 15, chap. 6, provides:

"When the expense of any work or public improve-
"ment shall exceed the sum of five hundred dollars,
"and the same is to be paid out of the general fund,
"or the water or the sewerage fund of said city, the
"doing of such work shall be let by contract, *in the*
"*same manner as is provided in cases where the expense*
"*of the same is to be paid for by special assessment.*"

Section 21 of chap. 6, provides: "All contracts
"entered into by said board of public works, and all
"bids taken by them shall be entered into in the
"name of, and be made to the city of Chicago."

If the employment of a superintending architect were necessary in the case under consideration, his compensation would be a part of the expense of the construction of the building, and the value of his services being, as alleged by plaintiff, in excess of five hundred dollars, *the expense could not be incurred except by contract made by the board of public works, in the manner prescribed by the charter.* Yet the plaintiff claims that this incidental expense was legally incurred by the passage by the common council of the resolution adopting the plan, it not appearing, and no evidence having been offered to show that any contract whatever was ever made in respect to the principal matter, viz: the erection of the building, or that any building has in fact been erected. It is a familiar rule that when the means for the exercise of a granted power are prescribed, all other means are, by implication, excluded.

Cooley on Cons. Limit., 64.

Field v. *The People, &c.*, 2 Scam., 79.

Mix v. *Ross*, 57 Ill., 122.
Mason v. *Shawneetown*, 77 Ill., 537.
Trustees, &c., v. *Lapler*, 23 Ill., 90.
Gates v. *City of Aurora*, 44 Ill., 121.
East St. Louis v. *Wehrung*, 50 Ill., 28.
Farmers' Loan and Trust Co. v *Cornell*, 5 Barb., 649.
People v. *Schermerhorn*, 19 Barb., 558.
Briggs v. *Town of Georgia*, 15 Ib., 72.
Cowen v. *Village of West Troy*, 43 Ib., 48.
Brady v. *New York*, 20 How. Prac. R., 443.
Marsh v. *Chestnut*, 14 Ill., 223.
Johnson v. *Louisville*, 11 Bush., 553.

The case of the *First Unitarian Society of Chicago* v. *Faulkner et al.*, 1 Otto, 415, cited by counsel, has no application to the case at bar. That was a suit by an architect for compensation for preparing plans, and turned upon the question whether by accepting the plans the society did not become bound to pay for them. It does not appear that any prizes were offered or paid for competitive plans. In the case at bar the plans were prepared and exhibited in response to an advertisement offering prizes for the three plans of the highest excellence, and the prizes were paid. All the competitors worked at their own risk, the only inducement being the prizes offered. The plaintiff's plans were returned to him, as appears from the fact that he himself produced them on the trial. (Rec. p. 37.)

III.

Custom.

The learned counsel for the plaintiff impliedly admitted on the trial that the passage by the common council, Oct. 10, 1873, of a resolution adopting the plaintiff's plans did not, of itself, constitute a contract. This he did, by offering to prove an alleged custom of architects, viz., that in the absence of a special contract, the superintendence of the construction of a building belongs to the architect whose plans are adopted (Rec. p. 37), which offer of proof was unnecessary if the resolution itself constituted a contract. Custom may vary the construction of a contract, or add to it terms and stipulations not expressed in it (1 Parsons on Contracts, p. 547; 2 Idem, p. 537), but it is a new, unprecedented, and altogether unwarranted proposition, that custom can make a contract. The contract is the principal thing, custom or usage merely an incident, and before the incident can be annexed by construction, the contract, the principal thing, must be proved. (2 Pars. on Cont., p. 537, n. f.)

There is no authority for the proposition that mere custom can *create* a contract, and no case could illustrate more than the present its utter unreasonableness.

Respectfully submitted,

FRANCIS ADAMS,

Corporation Counsel, for Defendant in Error.

Wm. C. Goudy,

Of Counsel.